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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 CODY DEAN BYRD,

11 Plaintiff,

12 v.

13 MERIDIAN FORECLOSURE SERVICE,
14 *et al.*,

15 Defendants.

Case No. 2:11-CV-00096-KJD-PAL

ORDER

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17 Presently before the Court is Defendant Deutsche Bank National Trust Company's Motion to
18 Dismiss (#4) and Defendant One West Bank, FSB's Motion to Dismiss (#5). To date, Plaintiff has
19 failed to file points and authorities in opposition to either motion as provided in Local Rule 7-2.
20 Local Rule 7-2(d) allows the Court to consider failure to file points and authorities in opposition as
21 consent to the granting of the motion. Additionally, the Court has reviewed Deutsche's Motion, and
22 finds it to have merit.

23 **I. Background and Procedural History**

24 Plaintiff Cody Dean Byrd executed a promissory note and deed of trust for the property
25 located at 7946 Lookout Rock Circle, Las Vegas, Nevada 89129, in December, 2005. Specifically,
26 Plaintiff took out a mortgage with Aspen Mortgage, LLC in the amount of \$809,818.00, and secured

1 the loan with a deed of trust. It is undisputed that Plaintiff stopped making the regular mortgage
2 payments on his loan. Defendants have now moved to dismiss all of Plaintiff's claims for failure to
3 state a claim upon which relief may be granted.

4 II. Standard for a Motion to Dismiss

5 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as
6 true and construed in a light most favorable to the non-moving party." Wyler Summit Partnership v.
7 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
8 Consequently, there is a strong presumption against dismissing an action for failure to state a claim.
9 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

10 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
11 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937,
12 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
13 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to
14 draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

15 The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies "the
16 allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations
17 which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the
18 Court considers the factual allegations "to determine if they plausibly suggest an entitlement to
19 relief." Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion
20 to dismiss. Id. at 1950.

21 III. Analysis

22 A. Breach of Contract

23 A breach of contract requires showing of (1) the existence of a valid contract, (2)
24 performance or excuse for non-performance of the contract, (3) breach, and that (4) damages have
25 been sustained as a result of the breach. Calloway v. City of Reno, 993 P.2d 1259 (Nev. 2000).

1 Plaintiff alleges that Defendants breached the promissory note by refusing to produce the
2 original note before commencing non-judicial foreclosure proceedings. (Complaint ¶ 17). The ever-
3 expanding body of case law within this district holds that the Nevada law governing non-judicial
4 foreclosure, NEV. REV. STAT. § 107.080, does not require a lender to produce the original note as a
5 prerequisite to nonjudicial foreclosure proceedings. Weingartner v. Chase Home Finance, LLC, 702
6 F.Supp.2d 1276, 1280 (D. Nev. 2010).

7 Moreover, Plaintiff admits that he defaulted on his loan by ceasing to make payments. Thus,
8 he may not assert a breach of contract claim against Defendants. Finally, Plaintiff does not allege
9 privity of contract between himself and the Defendants. Therefore, Plaintiff's breach of contract
10 claim fails as a matter of law.

11 B. Negligence

12 To bring a negligence claim in Nevada, a plaintiff must show that (1) defendant owed a duty
13 of care to plaintiff; (2) defendant breached that duty; (3) defendant's breach was the actual and
14 proximate cause of the plaintiff's injuries; and (4) plaintiff was injured. Scialabba v. Brandise
15 Constr., 921 P.2d 928, 930 (Nev. 1996). Liability based on negligence does not exist without a
16 breach of a duty. Bradshaw v. Blystone Equip. Co. of Nev., 386, P.2d 396, 397 (Nev. 1963).

17 Plaintiff alleges that Defendants owed him a duty to (1) produce the original note before
18 commencing non-judicial foreclosure proceedings and (2) "rightfully allow a loan modification."
19 Nevada law does not require the production of the original note before commencing non-judicial
20 foreclosure proceedings. Weingartner, 702 F.Supp.2d at 1280. Nevada law does not recognize a
21 cause of action against lenders for failing to consider their application for loan modification, or even
22 to modify an eligible loan. Simon v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 63480, at *26-27
23 (D. Nev. 2010). Accordingly, Plaintiff's negligence claim is dismissed, with prejudice.

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1 C. Intentional Infliction of Emotional Distress

2 In order to show intentional infliction of emotional distress in Nevada, a plaintiff must allege
3 that (1) the defendant engaged in extreme and outrageous conduct with the intention of causing
4 emotional distress or with reckless disregard for plaintiff's emotional distress; (2) the plaintiff
5 suffered severe or extreme emotional distress as a result; and (3) the defendant's action were the
6 proximate cause of plaintiff's emotional distress. Jordan v. State, 110 P.3d 30, 52 (Nev. 2005).

7 Here, Plaintiff avers that Defendants' failure to produce the original note prior to
8 commencing a non-judicial foreclosure caused emotional distress. Plaintiff failed to identify any
9 actions taken by Defendants which were extreme and outrageous conduct with the either the
10 intention of, or reckless disregard for, causing emotional distress. Therefore, the Court finds that
11 Plaintiff has failed to state a claim for intentional infliction of emotional distress.

12 D. Violation of Fair Debt Collection Practices

13 To be liable for a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq
14 ("FRCPA"), the defendants must, as a threshold requirement, be "debt collector[s]" within the
15 meaning of the Act. Heintz v. Jenkins, 514 U.S. 291, 294 (1995). The FRCPA's definition of a debt
16 collector "does not include the consumer's creditors, a mortgage servicing company, or any assignee
17 of the debt, so long as the debt was not in default at the time it was assigned." Perry v. Stewart Title
18 Co., 756 F.2d 1197, 1208 (5th Cir. 1985). Mortgagees and their assignees, servicing companies, and
19 trustee fiduciaries are not included in the definition of "debt collector." Id. The fourth cause of
20 action is dismissed with prejudice.

21 E. Violation of the Fair Credit and Reporting Act

22 Under the Fair Credit Reporting Act ("FCRA") 15 U.S. § 1681, et seq. a 'furnisher' must not
23 provide any information to a credit reporting agency if the 'furnisher' 'knows or has reasonable cause
24 to believe that the information is inaccurate.' 15 U.S.C. § 1681s-2(a)(1)(A). The complaint fails to
25 allege any fact that would allow the Court to reasonably infer that Defendants are either a 'furnisher'

1 as defined in the FCRA, or committed any acts in violation of the FCRA. Accordingly, the Court
2 dismisses the FCRA claims against Defendants.

3 F. Securitization

4 A court may dismiss a claim where there is either a “lack of a cognizable legal theory” or “the
5 absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police
6 Dept., 901 F.2d 696, 699 (9th Cir. 1990). Nevada law does not impose a legal duty on a lender to
7 inform the borrower of the potential securitization of his mortgage note. Guerra v. Just Mortg., Inc.,
8 2010 U.S. Dist. LEXIS 123739 at, *12 (D. Nev. November 22, 2010); Chavez v. Cal. Reconveyance
9 Co., 2010 U.S. Dist. LEXIS 63415 at, *5 (D. Nev. July 17, 2010)(“NRS 107.080 does not forbid the
10 securitization of a loan”). The sixth cause of action is dismissed with prejudice.

11 G. The One Action Rule and Cash Collateral

12 The seventh claim for relief is entirely absent of facts sufficient to maintain a cause of action
13 for the one action rule and cash collateral. The failure to state facts sufficient to state a claim
14 requires dismissal. Balistreri, 901 F.2d at 699.

15 H. Service under Federal Rule of Civil Procedure 4(m)

16 Plaintiff’s complaint was filed in Nevada state court on December 7, 2010. Federal Rule of
17 Civil Procedure 4(m) requires service of summons and complaint to be made upon a defendant 120
18 days after the filing of the complaint. The 120 day time period for effecting service of the summons
19 and complaint upon the remaining Defendants expired no later than April 7, 2011. Plaintiff has not
20 yet filed proof of service.

21 Accordingly, IT IS HEREBY ORDERED that Plaintiff shall have up to and including
22 April 25, 2011 to file proof of service of the summons and complaint within the allowed time. If
23 Plaintiff fails to respond or to file proof of service, the Court will dismiss the complaint without
24 prejudice in accordance with Federal Rule of Civil Procedure 4(m).

1 IV. Conclusion

2 Accordingly, IT IS HEREBY ORDERED that Defendant Deutsche Bank National Trust
3 Company's Motion to Dismiss (#4) is **GRANTED**;

4 IT IS FURTHER ORDERED that Defendant One West Bank, FSB's Motion to Dismiss (#5)
5 is **GRANTED**;

6 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants
7 Deutsche Bank National Trust Company and One West Bank, FSB only and against Plaintiff;

8 IT IS FURTHER ORDERED that Plaintiff file proof of service of the summons and
9 complaint upon the remaining defendants no later than April 25, 2011.

10 DATED this 8th day of April 2011.

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14 Kent J. Dawson
15 United States District Judge
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